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CONSTRUCTION LAW

Construction Companies' Wage-and-Hour Noncompliance Viewed as 'Wage Theft'

BY CAROLYN H. KENDALL,
ANDREA M. KIRSHENBAUM
AND ABRAHAM J. REIN

Special to the Legal

The headline “How companies rip off poor employees and lax enforcement lets them get away with it” graced the pages of the Chicago Sun Times on May 4. Similar calls for prosecutors to aggressively go after wage payment noncompliance—including failing to correctly pay overtime, allocate benefits, or classify workers—as if it were “theft” have been reported throughout the country with increasing frequency in recent years.

Prosecutors have answered the call. Government wage-related enforcement—focused particularly on the construction industry—is gaining momentum, and the repercussions for construction companies’ wage-and-hour compliance failures are only intensifying in both the civil and criminal realms. Indeed, as the focus has intensified, wage and hour noncompliance has increasingly drawn criminal charges, leaving employers fearful of fines, regulatory actions, and, in some cases, incarceration.

• **Wage-and-hour compliance veers toward the criminal realm.**



KENDALL

CAROLYN H. KENDALL (ckendall@postschell.com) is a principal in Post & Schell’s internal investigations and white-collar defense group, where she defends individuals and corporations facing criminal and civil investigation in highly regulated areas such as health care, pharmaceuticals and financial services. She can be reached at ckendall@postschell.com.



KIRSHENBAUM

ANDREA M. KIRSHENBAUM is the chair of the firm’s employment and labor practice group, and related subgroups, including employment and employee relations, employment and collective class actions, labor, wage-and-hour, and trade secret and noncompete law, and is a member of the firm’s appellate department. She can be reached at akirshenbaum@postschell.com.



REIN

ABRAHAM J. REIN is a principal in the firm’s internal investigations and white-collar defense group, and co-chair of the firm’s information privacy and security group. He defends clients in a broad spectrum of industries, including health care, construction, pharmaceutical, medical device, hospitality, insurance, financial services, among others. He can be reached at arein@postschell.com.

Traditionally the focus of wage-and-hour compliance disputes has been in the civil realm, either through private litigation or through the Department of Labor’s enforcement authority under the Fair Labor Standards Act

(FLSA), which lays out employer obligations to pay minimum wage and overtime, and sets requirements regarding child labor and recordkeeping. See 29 U.S.C. Sections 211, 216. But in recent years, prosecutors have increasingly used Section 216(a) of the FLSA—which provides for imprisonment for willful violations—to criminally prosecute employers for wage and hour noncompliance.

On the state side, Pennsylvania's Prevailing Wage Act (PPWA), introduced in 1961, requires construction employers to pay the prevailing minimum wage and keep accurate pay records for proper compensation of employees. See 43 P.S. Section 165.1 et seq. (1961). The PPWA provides employees the ability to have payment issues resolved civilly, and this is the context in which the act has traditionally been used. The only explicit mention of a criminal penalty in the PPWA applies to an employer that lies under oath, an offense that carries possible jail time. Otherwise, underpaid employees are required to inform the employer, and give the employer ample opportunity to supply the appropriate compensation. Recently, prosecutors have used violations of the PPWA as a predicate for traditional criminal theft statutes and sought jail time and hefty criminal fines and penalties against employers.

This trend has focused primarily on the construction industry, in both union and nonunion businesses. Construction companies should be aware of this increasing trend toward criminal prosecution and civil penalties.

• **An uptick in traditional civil enforcement of wage-and-hour**

compliance issues against construction companies.

Civil and administrative enforcement of wage-and-hour laws always has been part of the landscape for construction companies. But in the present climate, the focus has intensified.

For example, New Jersey recently increased the statute of limitations, expanded audit rights, and increased liquidated damages for failure to pay wages. See N.J. Stat. Section 34:11-58.6. Similarly, states and localities also have created “wage theft” task forces, including in Philadelphia, New Jersey, Virginia and Illinois. Nigel Thompson, “Philadelphia

The PPWA and the FLSA recently have been used as predicates for criminal charges for employers who underpay their workers. This uptick in criminal enforcement has sent shockwaves through the construction industry.

City Council votes to make the Department of Labor permanent, expand its powers, Al Dia Politics” (Feb. 14, 2020); Brittany E. Grierson, “Murphy’s Task Force Takes Hard-Line Approach Against Employee Misclassification,” New Jersey Law Journal (Sept. 16, 2019); New Jersey Gov. Phil Murphy, Press Release, “Governor Murphy Releases Report on Employee Misclassification” (Aug.

9, 2019); Illinois Attorney General, Press Release, “IL: Attorney General Raoul Convenes First Meeting Of Worker Protection Task Force” (Jan. 23, 2020).

As one might expect with this increase in government attention, civil enforcement is increasing, and, unsurprisingly, the construction industry is in the crosshairs. On April 30, the New Jersey Department of Labor & Workforce Development (NJDLWD)—in the first-ever use of the state’s broad shutdown authority granted under a two-year-old law—ordered Newark-based Cunha’s Construction Inc. to stop all statewide work after paying misclassified employees cash off the books and not providing workers’ compensation insurance. New Jersey Department of Labor, “NJLWD Issues Stop-Work Order Against Construction Contractor, Halting All Current and Future Work” (April 30, 2021). Other violations, including failure to pay overtime and keep accurate records, have caused the labor agency to charge Cunha’s nearly \$300,000 in fines and back wages. Stephanie Loder, “N.J. Shuts Down Contractor Over Labor Violations at Two Sites,” Engineering News-Record (June 8, 2021). While in the past, wage-related enforcement typically led to a company ceasing operations at the specific sites where there was an issue, Cunha’s had to stop all operations in New Jersey. Cunha’s will continue to incur further fines for each day that business is conducted in New Jersey. Cunha’s also faces a civil suit filed on May 11 on behalf of roughly 200 workers (N.J. Shuts Down Contractor).

A few months later, the NJDLWD stopped work at an Ewing, New Jersey, construction site due to subcontractors violating state labor laws. Assistant Commissioner of the New Jersey Division of Wage and Hour Compliance Joseph Petrecca, Press Release, “NJ Department of Labor and Workforce Development Halts Work at Construction Site After Violations Found” (July 2, 2021). Three subcontractors were issued stop-work orders for failure to pay prevailing wage, among other violations. This case demonstrates the New Jersey Department of Labor’s willingness to aggressively pursue construction companies for civil penalties. This also highlights the importance of monitoring subcontractors’ wage compliance, as general contractors may suffer consequences for any violations “on their watch.”

Even as civil enforcement actions become more prevalent in recent years, criminal charges are becoming more common as well.

- **Corresponding increase in criminal prosecutions of construction companies for wage-and-hour violations.**

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In the past year alone, there have been several criminal enforcement actions against construction companies and their owners for underpaying workers’ wages and fringe benefits, and the trend shows no signs

of abating. The Delaware County district attorney, in conjunction with the Pennsylvania attorney general, brought their first wage prosecution in January 2021 against a drywall company, alleging that the employer had improperly classified workers “independent contractors” to avoid paying appropriate wages and benefits. Mary McKenzie, “Four Arrested for Unfair Labor Practices—‘It’s Really Theft,’” *Delaware Valley Journal* (Jan. 11, 2021), <https://delawarevalleyjournal.com/four-arrested-for-unfair-labor-practices-its-really-theft/>; Carolyn H. Kendall & Abraham J. Rein, “Employers Must Be Mindful of Pay Practices, As Criminal Charges for Underpayment of Workers Becomes Increasingly Common,” 28 *Business Crimes Bulletin* L.J.N. (May 2021) (“Employers Must Be Mindful”). This drywall company was prosecuted under Pennsylvania’s Construction Workplace Misclassification Act, 43 P.S. Section 933.1 et seq., among other statutes. This statute provides that the government should consider factors such as the history of the employer’s violations, the seriousness of the violations, the good faith of the employer, and the size of the employer’s business in crafting remedies. While worker misclassification was always illegal under this decade-old act, criminal prosecutions under the Act were rare.

A few months later, in April 2021, Pennsylvania Attorney General Josh Shapiro brought what he describes as “the largest prevailing wage criminal case on record—under Pennsylvania prevailing wage law and across the United States under federal law,”

based on a contractor’s alleged failure to set aside funds for prevailing wage employees’ fringe benefits as required by the federal Davis-Bacon Act. Pennsylvania Attorney General Josh Shapiro, Press Release, “AG Shapiro Announces Multi-Million Dollar Theft Charges Against State College Contractor” (April 8, 2021). The attorney general charged the contractor with four counts of “theft” under 18 P.S. Section 3927, which criminalizes “theft by failure to make required disposition of funds received.” On Aug. 3, the company pleaded guilty to four counts of felony wage theft. The company was sentenced to five years’ probation, the imposition of a corporate monitor, and is required to pay more than \$20 million in restitution to over 1,000 current and former employees. Pennsylvania Attorney General Josh Shapiro, Press Release, “Hawbaker Sentenced, Will Pay Workers More Than \$20 Million in Stole Wages” (Aug. 3, 2021). This case, and the allegedly large dollar figures involved, demonstrates the intensity with which Pennsylvania authorities are now pursuing construction companies for their compensation-related mistakes.

As if to underscore the lesson, that same month, a central Pennsylvania contractor who pled guilty to underpaying workers on prevailing wage projects, in violation of the PPWA, was sentenced to over two years in prison and ordered to pay over \$64,000 in restitution to workers. His company was ordered to pay a \$10,000 fine related to the alleged underpayment. Pennsylvania Attorney General Josh Shapiro, Press Release, “State College Contractor Receives

Prison Sentence for Stealing From Workers” (April 26, 2021). This contractor was “the first to be charged criminally for violating the nearly 60-year-old [PPWA].” Brett Pallotto, “State College business owner sentenced to jail time after pleading guilty to withholding wages,” Centre Daily Times (Apr. 26, 2021). This was not the first incident of alleged payment non-compliance by a company associated with the contractor: according to the attorney general, a previous affiliated company was involved in a similar scheme—and the violations were addressed via administrative sanctions. This time, however, not only was the contractor been fined, but he also will serve a prison sentence.

This trend is likely to continue. For example, the New Jersey Wage Theft Act recently has been amended to increase criminal charges and penalties for wage theft, even going so far as to create a new crime entirely: Pattern of Wage Nonpayment. N.J. Stat. Section 34:11-58.6.

• What construction companies can do to mitigate enforcement risks.

Construction companies can take a number of steps to protect themselves from “wage theft” prosecutions, civil litigation and enforcement actions. Proper “auditing” of pay practices under the ambit of attorney-client privilege can help identify potential wage and hour violations and recommend remedial measures to address them. Andrea M. Kirshenbaum and Darren M. Creasy, “Building Litigation Firewalls With a Wage-and-Hour Audit,” 249 The Legal Intelligencer (2014). These

wage and hour audits can take different forms, including analysis of worker classifications, assessment of potential exposure for off-the-clock work, or review of pay practices, among others.

While best practice certainly is for such “audits” to be shielded by the attorney-client privilege, careful consideration should be given at the outset to whether the employer may one day want to *waive* the privilege to establish good-faith reliance on professional advice—a crucial defense in increasingly common criminal proceedings, and a useful defense in FLSA civil matters as well.

With the Pennsylvania Supreme Court’s recent decision in *Heimbach v. Amazon.com*, 2021 Pa. LEXIS 3047 (Pa. July 21, 2021), expansively defining the Pennsylvania Minimum Wage Act (PMWA) to require payment for time spent on an employer’s premises while waiting in security check lines (such time is not compensable under the FLSA) and concluding that there is no *de minimis* exception under the PMWA, more civil actions under the PMWA certainly seem likely.

Because the construction industry faces an especially critical eye from criminal prosecutors, it may be helpful to look specifically for common forms of wage and hour violations within the industry. According to the U.S. Department of Labor, typical accusations related to employers in the construction industry are: failure to record all hours worked to include time spent working before and after the shift; shorting hours by using terms like “down time” or “rain delay”; failure to compensate for meal breaks when employees are not completely

relieved of all duties; “banking” of overtime hours in the form of “comp time,” which is not permissible for private employers; failure to combine the hours worked for overtime purposes by an employee in more than one job classification for the same employer within the same workweek; failure to segregate and pay overtime hours on a workweek basis when employees are paid on a biweekly or semi-monthly basis; and failure to pay for travel from the “shop” to the work-site and back. U.S. Department of Labor Wage and Hour Division, “Fact Sheet #1: The Construction Industry Under the Fair Labor Standards Act (FLSA) (2008).

Employers, especially those in the construction industry, should not ignore the trend of enhanced enforcement in this area. Prosecutors are motivated and have seen a series of recent successes. They are dedicating resources to this issue and are aggressively applying a “theft” prosecution model to what was once commonly considered a civil or administrative matter. Employers need to proceed with caution, as what commonly involved purely civil remedies now might create the risk of criminal prosecution.

Post & Schell summer intern Maura White contributed in the drafting of this article. •